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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

INA AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA

Plaintiff,

vs.

STEVEN CARROLL DEMOCKER

Defendant.

No. P1300CR201001325

REPLY TO STATE'S RESPONSE TO
MOTION TO SEVER COUNTS
(Oral Argument Requested)

COMES NOW THE DEFENDANT, by and through his attorney
undersigned, and Replies to the State's Response to the Motion to Sever Counts.

MEMORANDUM

In its Response, the State argues that the Counts should be joined pursuant to Rule 13.3(a)(2). (States Response p. 6) Rule 13.3(a)(2) allows joinder when offenses "Are based on the same conduct or are otherwise connected together in their commission." Clearly what occurred on July 2, 2008 – the basis for Counts 1 and 2 – are not "based on the same conduct" as what occurred months later with regard to the basis for the Fraud counts 3 through 10. The conduct alleged for the Murder and Burglary charges is distinct and much different than the conduct alleged to have been committed for the Fraud charges. Thus, under Rule 13.3(a)(2), the question becomes whether the offenses "are otherwise connected together in their commission."

1 The Arizona Supreme Court in *State v. Prion*, 203 Ariz. 157, 52 P.3d 189
2 (2002), addressed this subsection of Rule 13.3(a). It held that the “‘otherwise
3 connected together in their commission’ language addresses whether evidence of the
4 two crimes was so intertwined and related that much the same evidence was relevant
5 to and would prove both, and the crimes themselves arose out of a series of
6 connected acts.” *Prion*, 203 Ariz. at 162, 53 P.2d at 194. The Arizona Supreme
7 Court further held that this provision should be interpreted narrowly. *Prion*, 203
8 Ariz. at 163, 53 P.2d at 195.

9 Interpreting this subsection with a narrow view to the alleged offenses joined
10 in this case, it is clear that Count 3 though Count 10 do not arise out of series of
11 connected acts with Counts 1 and 2. The actions the state alleges which caused the
12 death of Carol Kennedy on July 2, 2008, are not part of a “series of connected acts”
13 which occurred with respect to the Fraud counts 3 through 10. Mr. DeMocker’s
14 phone calls, made over eight months after Ms. Kennedy’s death, attempting to
15 obtain funding to pay for his defense, are not part of a series of acts in any way
16 related to the Murder and Burglary counts. The state’s argument is that the phone
17 calls attempting to obtain funding for his defense was part of Mr. DeMocker’s
18 financial motive in killing his ex-wife. This is simply not the case. The need for
19 funding to pay for his defense stems from Mr. DeMocker’s arrest and subsequent
20 charges. While the state may claim there was a financial motive at the time of the
21 killing, the supervening events of Mr. DeMocker’s arrest and custody show that the
22 attempt to obtain the funds were solely to pay for his defense. In fact, the phone
23 calls by their very nature show that the motive to obtain the funds was to defend
24 against the charges – not to obtain any financial benefit at the time of Ms. Kennedy’s
25 death.
26

1 The same can be said about the “voice in the vent” and the “anonymous
2 e-mail” charges. These charges are not connected to the Murder and Burglary
3 offenses themselves, but rather the defense of them. The *crimes* themselves do not
4 all arise out of a series of acts. By the state’s own admission, it is the *defense of the*
5 *crimes* to Counts 1 and 2 that result in the actions alleged in Counts 3 through 10.
6 Using a narrow interpretation, as instructed by the Arizona Supreme Court in *Prion*,
7 the charges are not properly joined using Rule 13.3(a)(2).

8 The state also argues that “Defendant’s effort to lead this Court down a Rule
9 404(b) analysis is without legal merit.” (Response p. 4.) However, the Arizona
10 Supreme Court in *State v. Ives*, 187 Ariz. 102, 927 P.2d 762 (1996) and *State v.*
11 *Prion*, 203 Ariz. 157, 52 P.3d 189 (2002) has stated otherwise. Both cases hold that
12 when joinder should not have been permitted and evidence is not cross-admissible
13 under Rule 404(b) then a denial of severance is error. *Ives*, 187 Ariz. at 112, 927
14 P.2d at 772, *Prion*, 203 Ariz. at 164, 52 P. 3d at 196.

15
16 In considering the 404(b) analysis, it is important to consider the defense
17 alleged. In this case, Mr. DeMocker’s defense to Counts 1 and 2 is that he did not
18 commit the Murder and Burglary. In *State v. Torres*, 162 Ariz. 70, 781 P.2d 47
19 (App. 1989) the state introduced 404(b) evidence in a case claiming it was
20 admissible to prove motive, knowledge, intent, or absence of mistake or accident.
21 The problem, however, was that not one of these items was in issue in the case. The
22 Court of Appeals held:

23 The problem with the state’s argument is the nature of the defense that
24 Torres presented. He insisted that the heroin was not his, that he did
25 not throw it, and that the officers planted the heroin they said they
26 found in the parking lot. There is simply nothing in the case which
27 brings into play any issue of motive, knowledge, intent, absence of
28 mistake, or accident. The evidence of prior use of heroin was relevant

1 for only one purpose – to show that because the defendant had once at
2 some unspecified time in the past used heroin, he must have been in the
3 car for the purpose of purchasing the drug on this occasion. This is
4 precisely what Rule 404(b) forbids. Perhaps the trial judge was not
5 fully aware of the defense Torres would raise when he ruled that this
evidence could be admitted, but once the matter was put in issue, an
inquiry sufficient to make an informed ruling was necessary.

6 *Torres*, 162 Ariz. at 73, 781 P.2d at 80. DeMocker's defense of "I did not commit
7 this Murder" does not bring into play any 404(b) evidence. Therefore, because
8 Counts 3 through 10 are not properly joined, and because Rule 404(b) would not
9 allow the evidence of Counts 3 through 10 into the trial of Counts 1 and 2, the
10 Counts must be severed. Therefore, this Court should grant the defendant's Motion
11 to Sever.

12 Respectfully submitted this 22 day of August, 2011.

13
14 By  
15 Gregory T. Parzych

16 Original of the foregoing pleading
17 filed this 22 day
of August, 2011, to:

18 Clerk of Court
19 Yavapai County Superior Court
120 South Cortez St.
Prescott, Arizona 86303

20 Copy of the foregoing pleading
21 mailed this 22 day
22 of August, 2011, to:

23 The Honorable Warren R. Darrow
Jeffrey Paupore, Steve Young, Office of the Yavapai County Attorney

24 Craig Williams

25
26 By 

27 Gregory T. Parzych
28